R. E. Dietz Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 33 (AFL–CIO). Case 3–CA–15922

August 9, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 18, 1991, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed briefs in reply.

The National Labor Relations Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent excepts on due-process grounds to the judge's finding that the terms over which it bargained to impasse were nonmandatory subjects of bargaining. The Respondent contends that because it was not notified that the judge would find the terms nonmandatory on a theory other than that advanced by the General Counsel, it was deprived of a meaningful opportunity to defend against it. We disagree.

In the complaint and at the hearing, the General Counsel advanced the theory that the Respondent's profit-sharing proposal and its proposed ''superseding language'' provision were nonmandatory subjects of bargaining because they concerned wages already accrued to the employees under the 1985 contract and the 1986 concessions agreement. In finding that the terms at issue were nonmandatory as alleged, the judge specifically employed the General Counsel's accrued wages theory and found that under that theory the Respondent's profit-sharing prosposals were nonmandatory subjects of bargaining because they ''refer[red] to accrued wages under previous agreements.'' We specifically rely on this finding by the judge in concluding that the Respondent's profit-sharing proposal was a nonmandatory subject of bargaining. We do not rely on the judge's statement elsewhere that because the 1986 concessions concerned nonmandatory subjects of bargaining ''[w]hat followed from those concessions necessarily takes on the same character.''

The Respondent also excepts on due-process grounds to the judge's finding that the parties were not at impasse prior to August 24, 1990, a theory it argues was neither advanced in the complaint nor litigated at the hearing. In this regard, the Respondent contends that because the General Counsel conceded both at the hearing and in his brief to the judge that a bargaining impasse occurred outside the 6-month period in which an unfair labor practice charge must be filed under Section 10(b) of the Act, the judge erred by precluding it from presenting evidence that would establish that such an impasse did in fact occur and remained unbroken to August 24, 1990. The Respondent further contends that such a showing would require that the complaint be dismissed because any violation alleged would have occurred outside the 10(b) period. We disagree.

Assuming arguendo that an impasse had occurred outside the 10(b) period, we agree with both the General Counsel and the judge that the parties' renewal of bargaining during the spring of 1990, well within the 10(b) period, evidenced that the parties were not at impasse during that time. Thus, any impasse prior to the 10(b) period would have been broken by the spring 1990 bargaining. Because the Respondent had ample opportunity and did, in fact, litigate the events surrounding this bargaining and their significance, we conclude that it was not prejudiced by the judge's preclusion of evidence concerning any impasse that might have existed outside the 10(b) period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R. E. Dietz Company, Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael Cooperman, Esq., for the General Counsel.
John T. McCann, Esq. and *David W. Larrison, Esq.*, of Syracuse, New York, for the Respondent.
Alicia Lynch, Esq., of Union, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Syracuse, New York, upon an unfair labor practice complaint,[1] issued by the Regional Director for Region 3, which alleges that Respondent R. E. Dietz Company[2] violated Section 8(a)(1), (3), and (5)

[1] The principal entries in this case are as follows:

Charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 33 (AFL–CIO) (Union) against Respondent R. E. Dietz Company on September 21, 1990; complaint issued by Regional Director, Region 3, against the Respondent on April 17, 1991; Respondent's answer filed on May 6, 1991; hearing held in Syracuse, New York, on June 24 and 25, 1991; briefs filed by the General Counsel, the Charging Party, and the Respondent with me on August 5, 1991.

[2] The Respondent admits, and I find, that it is a New York corporation which maintains an office and place of business in Syracuse, New York, where it is engaged in the manufacture, sale, and distribution of truck lights, mirrors, and related products. During the preceding 12 months, the Respondent sold and shipped from its Syracuse, New York facility merchandise valued in excess of $50,000.

Continued

of the Act. More particularly, the complaint alleges that the Respondent bargained to impasse over a nonmandatory subject of bargaining, at which time an ongoing lockout of the Respondent's employees was converted into an unfair labor practice lockout. The Respondent contends that the subjects which prompted the impasse in bargaining were mandatory subjects of bargaining about which it was entitled to insist to impasse. On these contentions, the issues herein were joined.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

A. *Background*

The Respondent has operated a factory or factories in Syracuse, New York, and elsewhere since 1840. In recent decades, it has concentrated on manufacturing automobile mirrors and lights. Its two factories in Syracuse are the only ones involved in this proceeding. For many years its production and maintenance employees in those factories have been represented by the Union.

In 1985, the Respondent and the Union executed a 3-year collective-bargaining agreement which was due to expire on June 26, 1988. Not long after this agreement was signed, the Respondent had to face up to monumental financial problems which were threatening the life of the Company. There is no dispute that, in 1985, the Respondent experienced a net loss in excess of $3 million. (By some calculations, that loss exceeded $5 million). Even more critical than the operating loss was the fact that the Respondent had outstanding loans to four lending institutions in excess of $8 million and owed the Internal Revenue Service back taxes which, with interest, were nearly $500,000.[4] In light of this predicament, it approached the Union for midterm contract concessions in order to forestall almost certain bankruptcy.

Among the many provisions of the collective-bargaining agreement in effect in the summer of 1986 was a scheduled 1986 cost-of-living increase (COLA) of $1.20 an hour due to be implemented in the second quarter of 1986. As a result of a series of bargaining sessions, the parties agreed to a 7-percent reduction in existing daywork rates and base rates of all unit employees. They also agreed to a suspension of the $1.20 COLA. These changes were put into effect on July 14, 1986. The concession agreement did not act as a permanent forgiveness of the difference between the contract rates and the midterm new rates being put into effect. The concession agreement included an undertaking on the part of the Company to pay back all of these differences in compensation at some unspecified future date, i.e., when the Company became profitable.

As time went on, the parties came to a disagreement as to how long the 7-percent reduction in wages and the suspension of the $1.20-an-hour COLA were to remain in effect. The Union demanded that the wage reduction and the COLA suspension be eliminated on March 5, 1987. The Company refused, claiming an agreement that the wage reduction and the COLA suspension were to remain in place until the Company once again became profitable and insisting that the Company was not yet profitable. Not satisfied by this response, the Union filed a grievance seeking to terminate both of these concessions and the payment of lump sums due to affected employees for the amounts which had been withheld from their pay during the concession period. The matter went to arbitration before arbitrator William J. Fallon.

The arbitration case was complicated by the fact that the basic elements of the concession agreement had never been reduced to writing. Fallon took a great deal of testimony regarding the negotiations leading up to the concession agreement and recited much of it in his 57-page opinion. His award, dated June 20, 1988, read as follows:

> The parties did reach agreement in July of 1986. One of the terms of that oral agreement was that the concessionary wage package to which they agreed will remain in effect until the company becomes profitable.
>
> Because the Company has not yet become profitable, the Company has not violated the July 1986 concession agreement by continuing to keep the concession wage package in effect.
>
> The parties are directed to negotiate the terms of the pay back of concessions, and the definition of profitable, including the date for the restoration of pre-concession wages and COLA.
>
> Only the financial condition of the Syracuse operation of the R. E. Dietz Company shall be considered for the purpose of determining profitability. The subsidiaries shall be excluded from this determination.

As the award pointed out, one loose end in the oral concession agreement concerned which of the several definitions of profitability, discussed by expert witnesses during the arbitration hearing, the parties had intended to adopt in July 1986. The definition of profitability would control not only the date for reinstatement of deferred compensation but, in doing so, would also determine when growing debt of the Company for unpaid COLAs and unpaid wages, the amounts originally established in the contract would cease to accrue. In 1989, the arbitrator's award was confirmed by the trial division of the New York State Supreme Court.

One of the problems giving rise to this case is that the parties have yet to come to an agreement on a definition of profitability, as used in the 1986 oral agreement. Since that definition is still up in the air, the 7-percent wage reduction and the $1.20 COLA has never been reinstated as an ongoing benefit. Moreover, the amounts due and owing to employees for all concessions have not been paid back nor has the mode of repayment been agreed on. These unanswered questions lie in the background of the dispute herein.

Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Errors in the transcript have noted and corrected.

[4] One reputable accounting firm came to the conclusion that the Respondent's outstanding debts exceeded the total value of its assets by about $1 million.

On January 9, 1989, the Union struck in support of demands concerning not only the concession agreement but also for a new contract to replace the one which had expired in the summer of 1988. One effect of the strike excused the Company not only from paying current wages of striking employees but their absence also had the effect of tolling the accrual of any additional liability to these employees arising out of the concession agreement, since they were not on the payroll for any purpose.

On June 7, 1989, the Union made an unconditional offer on behalf of striking employees to go back to work. The Respondent refused this offer, electing instead to continue to operate its plants with replacements. It thereby imposed a lockout. The lockout continues to date. At the time of the strike, the Respondent employed about 200 people in its Syracuse bargaining unit. At the time of the hearing in this case in June 1991, that number had dwindled to about 25.

B. *Negotiations for a New Contract*

Throughout the strike and the lockout, the Respondent and the Union have continued to negotiate the terms of a new collective-bargaining agreement. A central feature of those negotiations has been an effort to come to terms on the matters left unresolved in 1986 and referred to in the arbitrator's award. Between 1988 and December 1990, more than 70 negotiating sessions took place, some of them under the auspices of a Federal mediator. These negotiating sessions brought about agreement on a large number of contract items but they did not serve to resolve the questions of when the Company would be obligated to begin paying back the deferred compensation which was due and owing under the 1986 concession agreement, what kind of COLA, if any, would be included in a forthcoming contract, and under what conditions would a COLA be paid.

In December 1989, the mediator suggested to all parties that the Respondent submit to the Union its final offer. The Respondent did so. The final offer was not a completed contract document as such, but, using the expired contract as a format, the Respondent drew up a list of changes and an appendix. Along with the provisions of the expired contract which were undisputed, these items constituted its complete offer.

The offer provided for a 3-year contract with no reopeners. As for profit sharing, the Respondent's summary sheet stated:

> Profit Sharing—Two profitsharing proposals: the first consists of a profitsharing plan functioning as a payback to individual employees of concession amounts given up through the effective date of a new contract, and the second consists of an ongoing profitsharing plan in lieu of reinstatement of 7% wage reduction and COLA, coupled with a wage increase at certain profit levels. These profitsharing proposals shall be instituted in consideration of 1986 concessions, going forward. The existing wage rates (reflecting the 7% reduction) will be incorporated into the contract. COLA language will be eliminated from the contract.
>
> The plan to be instituted under profitsharing proposal #l shall distribute applicable percentages of profits to eligible employees who participated in concessions through the effective date of the new contract, with individual payments pro-rated based upon total individual concession amounts. Eligibility shall be limited to individuals employed in the bargaining unit on July 8, 1986. The Union shall take full and complete responsibility for timely informing the company of current names and addresses of eligible participants, and/or their current beneficiaries.[5]
>
> The plan to be instituted under profitsharing proposal #2 shall distribute applicable percentages of profits to all bargaining unit members meeting eligibility requirements, with individual payments pro-rated based upon annual hours worked. This profitsharing proposal has the added feature of an added increase to base wage rates in the amount of 1.0 to 1.5 percent in the event a certain profit level is achieved. If the Company loses money in the year the increase goes into effect, the increase will be revoked for the following year. If the Company subsequently makes money over the appropriate threshold, the increase will be reinstated. There shall be only one such increase to base rates, or revocation, or reinstatement, during the term of the contract.

Attached to the actual text of profit-sharing plans were appendices which attempted to address, in specific quantifiable terms, just what would be meant by profitability, instead of leaving that term to a generic definition.

As to profit-sharing plan No. 1 (PSP 1), relating to the 7-percent wage reduction, the contract proposal provided that concession payments running from July 8, 1985, to the effective date of the contract would end after the full concession amount had been paid. These amounts would be repaid in accordance with a sliding scale of amounts, as follows:

Levels of Profit Before Taxes	*Percent of Profit Sharing*	*Amount of Profit Sharing to be Devoted to Repayment*
$250,000	2	$5,000
500,000	2	10,000
750,000	4	30,000
1,000,000	4	40,000
1,500,000	4.5	67,500
2,000,000	5	100,000
2,500,000	5	125,000
2,750,000	5	137,500
3,000,000	5	150,000
higher	5	150,000

With regard to profit-sharing plan No. 2, the company proposal provided that payments set forth in the schedule would take place in lieu of the 7-percent payback and COLA from June 25, 1988, going forward. The sliding scale of amounts to be devoted to this aspect of the Respondent's concession agreement obligation would be as follows:

[5] It should be remembered that all eligible participants under this formula had been on strike since early in 1989 and had not been on the Respondent's payroll for nearly a year.

Level of Profits	*Percent of Wage Increase*	*Wage Base $3.400 Million*	*Percentage*	*Amount of Profit Sharing to be Devoted to this Obligation*
$250,000	0	0		
500,000	0			
750,000	0			
1,000,000	1	$34,000	2	$20,000
1,500,000	1.5	51,000	3	45,000
2,000,000	1.5	51,000	4	80,000
2,500,000	1.5	51,000	4.5	112,000
2,750,000	1.5	51,000	4.5	123,750
3,000,000	1.5	51,000	5.0	150,000
higher	1.5		5	

The Respondent admitted that, under its proposal, its obligation to make either repayments or ongoing payments was wholly contingent upon profitability and that, if the Company did not make any profit, it would be under no obligation to make any repayments of sums due and owing under the 1986 concession agreement.

Another bone of contention was included in the Company's final offer. This was a provision, also found in previous offers, which read: ''The contract shall supersede all rights and obligations set forth under the 1985–88 agreement, including the 1986 modifications to that agreement, as permitted) by law.''

This proposal was communicated to union representatives on or about January 2, 1990. On January 12, 1990, copies of the proposal were also sent to striking employees with the following cover letter, signed H. H. Dietz, chief negotiator. It read:

> To: All Union Members
>
> R. E. Dietz Company first met with your negotiating committee on June 15, 1988. Since then there have been 71 more negotiating sessions. On December 22, 1989, your company notified Local #33 UAW that it was making its last and final offer, and expressed its hope that the membership would be given the opportunity to vote on this offer.
>
> I encourage you to read the enclosed material very carefully. This mailing includes a summary of the items contained in the company's last offer as well as a copy of all of the mutually agreed to new contract language and copies of the two profit-sharing plans which are part of the offer.
>
> You have been on strike/lockout now for one year. How much longer you remain out will be determined by you. Whether or not you vote on this offer, and whether or not this offer will be accepted or rejected, I do not know. I do know, however, that this is the company's final offer and will not be improved upon in the future. Please consider all of this information before making any decisions regarding this company offer.

Union and company negotiators met twice in January 1990—on the 18th and again on the 31st—to discuss the Company's final offer. At this first meeting union negotiators expressed their strong disapproval of the Company's action in forwarding the above-quoted letter and attachments to all union members, accusing company negotiators of direct dealing with employees and bypassing the bargaining agent. The Union also accused the Respondent of violating the labor laws by including nonmandatory with mandatory subjects of bargaining in its final offer. The Respondent denied this charge.

The Company wanted to explain the provisions of the final offer to union negotiators and to give them an opportunity to negotiate technical language to implement some items in the final written offer. These items had not been reduced to writing and some attention was given to formulating these concepts into final form. William Dotterer, the Company's personnel director, characterized the half-day meeting on January 18 as something which resembled an open forum. During this ''open forum,'' the parties initialed some contract items on which agreement had been reached. The Union proposed that the parties sign off on the bulk of the agreement and defer any negotiations on profit-sharing proposals relating to the concession agreement and the outstanding arbitration award. Company negotiators rejected this idea. There was also some negotiation of a successor clause but no agreement on this point.

On or about February 27,[6] the Union held a membership meeting for the purpose of voting on the Company's final offer. The membership accepted the terms of the offer, except for the ''superseding clause'' and the profit-sharing proposals (PSP Nos. 1 and 2). In fact, these provisions were not even submitted for ratification since there was general agreement, both among the membership and the union negotiators, that such issues were not proper items for a final offer or a contract.

The parties met again on March 20. At this time, there was renewed discussion about the profit-sharing proposals. Company negotiators presented the union contract language designed to iron out some technical corrections which the Union had noted in the profit-sharing proposals. There was still no agreement on PSP Nos. 1 or 2 or on the so-called superseding language. The parties did discuss the mechanics of making payments to individuals who had been on strike and how payments to beneficiaries of deceased strikers would be handled.

On March 26, Sandra Thayer, president of Local 33 and one of its principal negotiators, wrote the following letter to Hugh Dietz:

> At a meeting held on Friday, the 23rd of March, 1990, Local 33 UAW membership voted to approve the three-year agreement that would be the successor contract to replace the three (3) year agreement of 85–88 which expired June 26, 1988.

[6] Repeated testimony in the record refers to the union ratification meeting as having taken place late in February. The letter to the Company from Union President Thayer recites that the meeting took place on March 23. It is not necessary to resolve this conflict as to time. It is clear that, whenever the membership meeting took place, union members refused to ratify or even consider the disputed elements of the Respondent's proposal that are still at issue between the parties.

> The Union will expect the union workers to be put back to work and the lockout called off three days from the receipt of this letter.
>
> Also, please set up a time and date for the signing of the contract as soon as possible.

Inasmuch as the ratification did not include the superseding language or approval of the profit-sharing plans, the Respondent did not end the lockout. It is still in progress and no contract document has ever been signed.

In the late winter and spring of 1990, a collateral matter entered the picture and became a predominant concern in continued discussions between the parties. At that time the Respondent sold the bulk of its assets to the Federal Mogul Corporation, a Michigan company which also specializes in manufacturing automobile equipment. The Respondent derived a large lump-sum payment from the purchaser which permitted its books to reflect an unusual one-quarter profit. The resultant effect of selling off the bulk of its assets was to reduce the Respondent's operations to a fraction of what they had previously been. The sale also had a dramatic and negative impact on the Respondent's ability to become profitable on an ongoing basis. In order to preserve a fund out of which concessionary wage reductions and COLA deferrals could be repaid, the Union filed suit on April 3, 1990, in United States district court against both the Respondent and Federal Mogul Corporation, asserting a claim for unpaid wage concessions and unpaid COLA payments arising out of the 1986 concession agreements and the arbitrator's award. The suit sought to apply the purchase money from the asset sale to the repayment of the debt. The suit is still pending. (*Auto Workers v. R. E. Dietz Co.* and *Federal Mogul Corp.*, U.S. District Court, Case No. 90–CV–366).

C. *The Final Negotiating Sessions*

Within the 10(b) period, which became operative on March 21, 1990, three negotiating sessions took place—May 10, May 24, and August 24, 1990. At the May 10 meeting, the Union informed company negotiators that the membership had ratified the Company's final offer, except for the ''superseding language'' and PSP Nos. 1 and 2. It insisted that the ''superseding language'' be removed from the company proposal. The Company refused. The Company also insisted that PSP Nos. 1 and 2 be included in the final contract, to which the Union frequently responded that these proposals were nonmandatory subjects of bargaining and hence inappropriate for inclusion in a contract. Union negotiators asked several times if they would actually see any money under the Respondent's profit-sharing proposals and the company attorney replied that they would not. Union negotiators asked rhetorically how they could sensibly discuss the specifics of a profit-sharing proposal when they did not know how many employees would be left in the plant to benefit from it.

The Union's position was that the Company should sign off on the principal portions of the contract so that locked-out employees could return to work. Dietz told others that the replacements currently being employed were only temporary but that the temporary replacements would become permanent if the Union did not soon agree to the Company's entire package, whereupon his attorney spoke up to contradict him on that point. The Union suggested that the payback provisions be deferred to a later date, at which time an auditor could check the Company's books to see if it had become a profitable enterprise and, in the event of a dispute between company and union auditors, a neutral auditor could be employed to resolve the dispute. The Company did not approve of this suggestion. However, it did express interest in a union proposal that the newly filed U.S. district court suit be withdrawn. However, Respondent's negotiators tried to make it clear that the Company was not insisting that the suit be withdrawn as a condition of agreement on a contract. The Union's reply was that the suit could not be withdrawn without consultation with others who were not at the bargaining table. Company representatives wanted to make sure that the no-strike no-lockout provisions of the proposed contract were broad enough to cover any future negotiations over profit sharing and payback of concessions. The Union agreed that it would cover any such talks. As the session came to an end, Dietz said he wanted to examine the union offer and suggested that Mrs. Thayer put union proposals in writing so the Company could consider others in advance of another bargaining session, which was set for May 24.

At Dietz' suggestion, Mrs. Thayer wrote him the following letter, dated May 21:

> This Union made a proposal to the R. E. Dietz Company on 5/10/90 dealing with the arbitration/concession agreement of 1986. The Company asked for the proposal to be placed in writing with other requests.
>
> The Union has structured this letter and hopes it answers all your questions to our proposal and position. The proposal is as follows:
>
> After the union auditor has looked over the Company's books in the first quarter of 1991, UAW Local 33 and the Company will sit down and discuss the financial condition of the Company to establish the restoration and implementation of preconcession wages (7% and $1.20 COLA) or some portion thereof if possible. If no profits are available, then there will be a one (1) year anniversary date for each year thereafter. It is agreed this agreement will stay in force and effect until the preconcession wages are re-established.
>
> It will be the responsibility of both parties to be prepared at said meeting and there will be no extension on anniversary date.
>
> To resolve the arbitration order, paragraph 3, the Union will accept Company's proposal of money and percentage levels on Company's proposal of profitsharing plan I contingent on Company's accepting Union's 5/10/90 proposal of preconcession wages (7% and $1.20 COLA). The Union will also accept language of profitsharing plan I with certain modifications that we have enclosed. All other agreements and language agreed to dealing with the 1986 concession agreement shall stay in effect and be placed in the contract, unless otherwise mutually agreed to or disposed of by Company and UAW Local 33 with appropriate signatures of both parties at this time.
>
> Your question about Article XXVIII (green book, strikes) union proposal of 5/10/90: it is the Union's position that the Union could not strike on this issue solely but only dealing with this arbitration.

> The 5/10/90 proposal would have no bearing on lawsuit, as lawsuit is for a different reason, nor would it have any impact on any present board charge. The Union will leave the legal semantics of settlement or disposal of current legal action to lawyer T. Giblin.

On May 24, the parties met for an hour and a half but still did not resolve their differences. The Union asked the Respondent how many jobs were still left in the plant. Their concern was that there might not be enough jobs left in the plant to permit the Company ever again to be profitable and to meet the threshold requirements of the profit-sharing payback proposals. They received no answer. When the Company learned that the Union was not going to withdraw the pending district court suit, it declined to consider any of the other proposals in Mrs. Thayer's letter regarding deferral of negotiations on profit sharing. When the Company rejected the Union's written offer, the Union requested that the rejection be made in writing. The Company said that it would do so, but if this was done, their rejection letter was not placed in evidence. When the parties broke, they agreed to meet again but no date was set.

The final meeting between the parties took place on August 24, 1990. The Union opened the discussion by saying that they did not come to the table to talk about the lawsuit but had a counterproposal to make. They said they would agree to PSP No. 1, relating to the payback of the 7-percent pay reduction, if the Company would defer discussion of PSP No. 2, relating to the COLA, until January 1992 and at 6-month intervals thereafter. The Respondent rejected this idea, saying that they wanted to end up with no liability under the 1986 concession agreement apart from the provisions of its final offer. They also asserted that, if the Company never again became profitable, the employees involved in the 1986 concession agreement would never be repaid. Company representatives also charged that the Union had made its deferral proposal previously and it had been previously rejected. The Respondent also inquired if the counterproposal included dropping the lawsuit and union representatives replied that it did not. After taking a caucus, company representatives returned to the table, at which time Dietz told union negotiators that the parties were at impasse and had been at impasse for quite some time. This was the last meeting of the parties to discuss contract terms. The lawsuit remains in effect and the lockout continues.

II. ANALYSIS AND CONCLUSIONS

Two basic doctrines of the law of good-faith bargaining have a functional interplay in deciding the rights and liabilities of the parties to this litigation. In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court distinguished between mandatory and nonmandatory or permissive subjects of collective bargaining. It held that parties to contract negotiations could insist to impasse over mandatory subjects. With regard to nonmandatory subjects, while being free to discuss them, neither party may condition an overall contract to agreement to such items by the other party. Insisting to impasse over a nonmandatory subject of bargaining constitutes a violation of the duty to bargain in good faith set forth in Section 8(d) of the Act. As a result of this decision, a host of subsequent cases have arisen to adjudicate just what is or is not a mandatory subject of collective bargaining.

Seven years thereafter, the Supreme Court held that an employer engaged in collective bargaining was free to lock out its employees, at least temporarily and after impasse, in support of a legitimate negotiating position regarding a mandatory subject of bargaining. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). However, proof of an illegal motive on the part of an employer who has resorted to the use of a lockout may convert this otherwise permissible economic weapon into a violation of Section 8(a)(5) of the Act. *NLRB v. Brown Food Store*, 380 U.S. 278 (1965); *Teamsters (Bekins Movers)*, 224 NLRB 356 (1976). In this case, the General Counsel levels no attack on the Respondent's initial lockout, which occurred in June 1989, and indeed he cannot, since this event occurred far beyond the period of limitations. However, he contends that the ongoing lockout was converted into an unfair labor practice lockout on August 24, 1990, about a month before the charge was filed, because, on that date, the Respondent illegally bargained to impasse over nonmandatory or permissive subjects of bargaining, namely, the ''superseding language'' in the contract duration proposal and the PSP Nos. 1 and 2 proposals which were also contained in the final offer. Hence, the Board must determine if the disputed elements of that offer are mandatory or nonmandatory and if an insistence to impasse occurred within the 10(b) period.[7]

The 1986 concession agreement, which lies at the root of this dispute, was a midterm modification of an existing collective-bargaining agreement. The Union did not have to agree to that modification. Indeed, it did not even have to bargain about it, since a deal had been struck with the Respondent in 1985 and it was still in force and effect. The Union was under no obligation to change it in the middle of the contract term. All of the concessions made in those negotiations were the result of negotiating over nonmandatory subjects of bargaining. What followed from those concessions necessarily takes on the same character. The fact that some of these topics became part of future negotiations along with items which were clearly mandatory in nature does not change their character. *Chesapeake Plywood*, 294 NLRB 201 (1989).

To interpret and give effect to the oral understandings reached by the parties in 1986, the Union sought and obtained an arbitration award. This arbitration award interpreted and applied the terms of nonmandatory subjects of bargaining. It drew its vitality from the fact that the parties had entered what amounted to a collateral agreement, dehors the terms of the major agreement. That agreement was enforced by the decree of a civil court in a state arbitration confirmation action. The result of that award was a determination that the Respondent was indebted to its Employers for the amounts they had temporarily excused the Respondent from paying them under the terms of the contract, even though the exact amounts of those debts was yet to be calculated.

The award in question was a most peculiar one indeed. Normally, an arbitrator is limited to interpreting and applying the disputed terms of an agreement which the parties before

[7] The Board may not remedy an unfair labor practice which occurred 6 months before the filing of a charge. However, it may look to pre-10(b) conduct and events insofar as they ''lay bare a putative unfair labor practice.'' *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 413 (1960).

him have actually concluded. He has no right or authority to go outside the boundaries of the agreement which vests him with jurisdiction to proceed. He has no authority to tell the parties to finish negotiating a contract which is still incomplete. He cannot compel agreement where there is none. In this case the reviewing court noted that

> The parties entered into a partial, incomplete agreement whereby essential elements needed to be completed so that the parties may have a completed agreement.

This reference was to the failure of the parties to agree on the meaning of the term ''profitable.'' The failure of parties to agree on an essential term of an agreement normally renders a contract void, and a void contract is not arbitrable or enforceable in any kind of tribunal. This deficiency did not deter the arbitrator or the New York court from finding the concession agreement valid and interpreting some of its terms. These tribunals necessarily left one major string dangling and it is still dangling. To complete the agreement, the arbitrator and the court ordered the parties to negotiate the missing element which rendered the agreement incomplete. An arbitration award directing parties to negotiate an essential term of the contract under arbitration is something of an oxymoron. However, a remedy, if any, for this peculiarity lies with the arbitrator and the civil court, not the Board. The parties have not complied successfully with this mandate in the award, but they spent nearly 75 negotiating sessions trying to do so. The Board cannot compel agreement[8] and neither may an arbitrator. In the absence of any agreement between the parties as to the meaning of a disputed term, this litigation has arisen.[9]

The Respondent argues that, because the arbitrator directed the parties to negotiate the meaning of the term ''profitable'' and additional payback provisions which follow from such a definition, there now exists a mandatory subject of bargaining enforceable by the Board under the Act. In its view, the arbitration award, by its terms, has transformed a nonmandatory subject of bargaining into a mandatory one—an item on which the Respondent may now insist to impasse under the provisions of Section 8(d). This is simply not so. Obligations which have arisen under the arbitration award, as confirmed, are quite independent of any obligation imposed by the Act and enforceable by the Board. Having agreed to arbitrate the concession agreement and having received an award, the parties must look to the forums which provided these determinations for their implementation, not to the Board. This arbitration award would be enforceable, if at all, even if Section 8(d) of the Act did not exist. Hence its provisions neither add to nor subtract from the rights and liabilities of the parties under the Act.[10]

The Respondent's basic argument in support of its claim that all items in its final offer were mandatory in character fuzzes the distinction between underlying and continuing liability (or debt) and what method should be available for repaying that debt. The arbitration award, having been confirmed by a civil court, is an adjudication which states that the Respondent owes its locked out employees a debt amounting to the difference in preconcession wages and COLA and what they received between July 1986 before going out on strike. While a sum certain was not awarded, the Respondent admitted that, if its records were properly kept, a sum certain could be computed as to what would be due and owing to employees under the award, at least from the date of the concession agreement in July 1986 and the date of the strike in January 1989. Since the award was an adjudication, it is res judicata, and it is not permissible for the Board to go behind that adjudication to permit relitigation of the issues therein. For that reason, offers of proof by the Respondent aimed at doing so were rejected.

In its brief, the Respondent described PSP # 1 as follows:

> As indicated in the final offer itself and stated at the hearing, PSP # 1 functioned as the vehicle for ''payback'' of the 1986 concessions. PSP # 1 allocated benefits to eligible employees on a pro-rata basis according to the size of each employee's '' concession account.'' Individual concession accounts are established on the basis of the amounts each employee ''gave up'' during concessions, i.e. 7% of the employee's pre-concession base rate plus $1.20 COLA, multiplied by all hours worked by the employee during concessions. The employee's account is drawn down as profitsharing benefits are paid. Additional provisions are set forth in the plan governing such matters as the time of payment, computation of hours, determination of beneficiaries, audits, and arbitrations, id, none of which are at issue in this proceeding.

The profit-sharing plans in the final offer did a great deal more than merely provide a vehicle for repayment. They excluded from participation any employee in the bargaining unit hired after July, 1986, thus wiping out any debt owed to such persons. Of even greater importance, the plans established an *exclusive* vehicle for repayment, thereby wiping out any remedy for collection of the debt which might be available in a civil court. In so doing, it preserved from attachment the proceeds the money paid by Federal Mogul for the purchase of most of the Respondent's assets. The ''superseding language'' in the contract duration clause of the Re-

[8] *NLRB v. H. K. Porter Co*., 397 U.S. 99 (1970).

[9] The alternative facing the arbitrator, and the court on appeal, was to declare the concession agreement null and void, thereby causing the terms of the original agreement to spring immediately back into place and giving rise to an immediate judgment on the part of the Respondent for the difference between wages and benefits due under the 1985–1988 contract and what was actually paid to bargaining unit employees. Perhaps the arbitrator and the judge felt that this was a more unpalatable alternative than the one they chose.

[10] Other technical arguments advanced by the Respondent require only scant attention. The fact that the Union filed, and the Regional Office dismissed, other charges relating to bargaining between these parties does not in any way affect the right of the Board to hear and determine the dispute raised by the complaint herein. An administrative dismissal of a charge is not an adjudication and does not bar future proceedings which are otherwise litigable. Moreover, laches does not prevent the General Counsel from proceeding with this complaint. This complaint was issued to vindicate a public right, not a private right, so any actions of the Charging Party can in no way constitute laches, since laches does not run against the Government.

spondent's proposal stated categorically that ''the contract shall supersede all rights and obligations set forth under the 1985–1988 agreement, including the 1986 modifications to that agreement, as permitted by law.'' Hence any basis for the civil suit now pending in U.S. district court would be nullified by a merger of the outstanding liability of the Respondent to its employees under the concession agreement into the terms of the proposed contract and its exclusive contracted remedy.

The Respondent has already reduced the size of its plant and its potential for profitability to a minimum by the sale of most of its assets while it was insisting to impasse that any profits from its few remaining assets be the sole and exclusive basis for discharging its responsibility—no profits, no repayment. Taken together with the sale of these assets, their proposal to the Union throughout negotiations amounted to little more than an artfully concocted swindle aimed at foreclosing the possibility that any losses in wages due to concessions would ever be recouped. It is little wonder that the Union refused even to submit these proposals to a ratification vote by its locked out membership.

In *Harvstone Mfg. Co*., 272 NLRB 939 (1984), enf. denied on irrelevant grounds 785 F.2d 570 (7th Cir. 1986), the Board held that the term ''wages, hours, and terms and conditions of employment,'' as used in Section 8(d) of the Act, refers only to future wages and conditions, not to past wages which have already accrued and which are due and owing. The latter sums are debts arising of contracts already concluded, so any effort to go back and renegotiate settled deals is a nonmandatory subject of bargaining. Tested by this criteria, the entirety of PSP No. 1 and the ''superseding language,'' both of which would in effect wipe out the provisions of the concession agreement, refer to accrued wages under previous agreements. Any proposal to wipe out liability for these sums due and owing—or to impair the collection machinery generally available at law to collect these sums—does not constitute future wages, hours, and terms or conditions of employment. Hence, they are nonmandatory subjects of bargaining, even when lumped in with other proposals which are mandatory in nature.

With respect to PSP No. 2, future COLAs to be paid after the effective date of the agreement would, under the *Harvstone* criteria, be mandatory subjects. However, PSP No. 2 deals with more than COLAs to be paid at some subsequent time. The sliding scale of profitability set forth in PSP No. 2, governing when, if ever, the Company would be sufficiently profitable to resume paying COLAs under the new contract, also controls the cutoff date when liability for the payment of past COLAs and the 7-percent reduction due under the 1985–1988 contract (and suspended by the concession agreement) would cease. This is arguably but not clearly a mandatory subject of bargaining, even though it terminates a previously bargained agreement, since it substitutes in lieu thereof a new agreement. However, in the Respondent's bargaining posture, PSP No. 2 was inextricably linked to a clearly nonmandatory subject. When Dietz told union negotiators on August 24, 1990, that the parties were at impasse and had been at impasse for some time, he was referring to the ''superseding language,'' PSP Nos. 1 and 2 as a package, a package which remained intact and unseverable since the Respondent's final offer was made in January 1990, and even before. Hence, the impasse which was declared on August 24, 1990, arose from an insistence by the Respondent which conditioned its overall agreement to an agreement by the Union to nonmandatory subject of bargaining.

The last string in the Respondent's bow is that it did not bargain to impasse during the period limitations. Hence, the impasse, which everyone agrees is now in effect, began before the 10(b) period and what transpired thereafter was nothing new. From this premise the Respondent argues that it should not be charged in the complaint for conduct which the Board's processes cannot reach, even though that conduct may have continued into a period of time which would subject it to liability under the Act. In short, it urges the Board to reject a ''continuing violation'' theory which it attributes to the General Counsel. To buttress this contention, the Respondent argues that its final offer, transmitted to union negotiators on January 2, 1990, and sent out to bargaining unit members on January 12 of the same year, was an ''impasse offer'' and that the impasse began then, if not before that date, inasmuch as the Respondent has not varied its firm and final offer since January 2, adding that its offer contained items about which the Respondent had not in fact altered its position even long before that date.

The Respondent's contention in this regard contains several errors, both legal and factual. The seminal case on determining when and whether an impasse in bargaining has arisen in *Taft Broadcasting Co.*, 163 NLRB 475 at 478 (1967), in which the Board stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

It takes two to make an impasse. The fact that one side has never varied the terms of some or all of its offer does not, in and of itself, create an impasse in bargaining. The phrase used by the Respondent—''impasse offer''—is a contradiction in terms. An impasse does not arise until the ''parties . . . have [had] adequate opportunity to have exhausted all reasonable expectation of compromise.'' *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989). In this case, the Respondent claims that there has always been an impasse, while the General Counsel says that there might have been an impasse at one time but that any impasse had been broken and was renewed on August 24, 1990, at which time the Respondent's renewed insistence to impasse over nonmandatory subjects amounted to an unfair labor practice occurring with the 10(b) period. Neither theory of the case is wholly supported by the facts. In resolving this case, the Board is not limited by the theory of the case advanced by either party so long as its determination falls within issues framed by the complaint and answer.

When the Respondent submitted its final offer to the Union on January 2, there was agreement on all of the substantive items of a new collective-bargaining agreement, except for the three issues discussed above—the duration clause containing the ''superseding language'' and a new, quantified PSP Nos. 1 and 2. Far from being at impasse at this point

in time, the parties were perilously close to a contract. They had bargained for more than 70 sessions and had reached a meeting of the minds on every contract issue except the status of the outstanding debt owed by the Respondent to its employees arising out of the 1986 concession agreement and the appropriate method for repaying that debt. Indeed, at the two meetings held by the parties in January 1990, there were ongoing discussions concerning contract language which still had to be put in place before these matters could be finalized, and additional agreement was, in fact, reached during those meetings regarding at least some of these language problems. This is not a state of facts which defines an impasse.

The Respondent's final offer—its so-called impasse offer—was not submitted to the membership of the Union for ratification until either late February or sometime in March. Until that event occurred, it is idle to suggest the existence of an impasse since there was no response by the Union to the Respondent's firm and final proposal. Since the Respondent was bound to deal with union representatives, not bargaining unit members, and was not fully informed as to the nature and results of the ratification vote until May 10, no impasse could have arisen until at least that date. Before that meeting, the union president had written the Company, had informed it that their contract offer had been ratified, and had called on the Company to sign the contract and end the lockout. This statement was not wholly correct and the inquiries by company representatives on May 10 indicated that they suspected that it was not correct.

Moreover, between the ratification vote in February or March and the May 10 meeting, a new element had entered the bargaining equation. The Union filed a collection suit in Federal court on April 3 which, if successful, will make available to unit employees the proceeds of an asset sale to Federal Mogul for the payment of the ongoing liability of the Company for its mounting debt arising out of the concession agreement. This turn of events plainly bothered company negotiators, who were looking to limit their total liability to the terms of the contract and to future profits which, in all probability, would never materialize. For that reason, they looked with interest on a suggestion on the part of union negotiators that the lawsuit might possibly be withdrawn in exchange for a tradeoff from the Respondent, and asked union negotiators to put their proposal in writing in advance of the next meeting, then set for May 24. Such fluidity and the demonstrated desire, at least on the part of the Union, to eliminate all outstanding roadblocks to a complete understanding and completely negates the possibility of an impasse in bargaining as of May 10.[11]

Both the May 21 letter from the Union and their statement at the May 24 meeting indicated that they were not in a position to withdraw the suit, whereupon company negotiators stated flatly that they were not disposed to retreat from any of the disputed proposals in their final contract offer. Arguably, an impasse might have arisen at this point, well within the 10(b) period, but it certainly had not arisen before that time. Even in the face of this development, union negotiators were still trying to give bargaining process one more shot and company negotiators still appeared willing to listen and to schedule one more meeting to discuss what ultimately became the Union's final offer. The Union then announced that it was willing to accept the company proposal, then on the table, relating to PSP No. 1 if the Company would agree to defer further discussion until 1992 on PSP No. 2, execute the balance of the contract, and end the lockout. The proposal was a contingent one and the Company rejected it. Union negotiators then asked the Company to put its rejection in writing. They agreed to do so but, as far as the record in this case reflects, they did not. However, company negotiators did agree to another meeting, without specifying a date. That meeting ultimately occurred on August 24.

At the August 24 meeting, the Union renewed its contingent proposal concerning PSP Nos. 1 and 2. After lengthy caucuses by both sides, the Company again rejected the counteroffer, saying that it wanted to end up with a contract under which the Respondent would have no liability for repayment of concessions apart from contract profit-sharing provisions, i.e., PSP Nos. 1 and 2. If there were no profits in the future, there would be no repayments. It was at that point that Dietz declared that the parties were at impasse and had been at impasse for a long time. Thereafter, the parties met no more. I conclude that, at this point, the Respondent bargained to impasse with the Union over the ''superseding language'' in the contract duration clause and on both PSP Nos. 1 and 2. Since the principal thrust of this impasse was directed at nonmandatory subjects of bargaining, by insisting on their inclusion as a condition of entering into a contract, the Respondent bargained in bad faith in violation of Section 8(a)(1) and (5) of the Act. This act on its part converted a lawful lockout, then in existence, into an unlawfully motivated one. Since the lockout has continued to date, the employees who have still been deprived of employment became discriminatees as of that date and the refusal of the Respondent to reinstate them became, at that point, another unfair labor practice which violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. R. E. Dietz Company is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 33 (AFL–CIO) is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent at its Syracuse, New York facility, excluding all professional employees, office and plant clerical employees, inspectors, watchmen, guards, and supervisors, as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the

[11] The Respondent tried to make it plain that they were not conditioning a final contract on withdrawal of the lawsuit, since withdrawal of the lawsuit would, in all probability, be a nonmandatory subject of bargaining. However, they were conditioning a final contract upon union agreement to various terms which, if accepted, would require the U.S. district court to dismiss the suit upon the Respondent's application, since the basis of the suit would have been settled by agreement over ''superseding language'' and PSP Nos. 1 and 2. Their point in this regard is a distinction without a difference.

purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By bargaining to impasse with the Union over nonmandatory subjects of bargaining, the Respondent violated Section 8(a)(5) of the Act.

6. By the acts and conduct set forth above in Conclusion of Law 5, the Respondent on August 24, 1990, converted an ongoing lockout into an unfair labor practice lockout.

7. By failing and refusing to reinstate the employees referred to above in Conclusion of Law 3, to their former or substantially equivalent positions, the Respondent, on and after August 24, 1990, has violated Section 8(a)(3) of the Act.

8. The aforesaid unfair labor practice have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. The recommended Order will request that the Board order the Respondent to offer to all employees whom it locked out in June, 1989, full and immediate reinstatement to their former or substantially equivalent positions, and that it make them whole for any loss of earnings or benefits which they may have sustained on and after August 24, 1990, by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[12] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, R. E. Dietz Company, Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining to impasse over nonmandatory subjects of bargaining.

(b) Otherwise refusing to bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 3 (AFL–CIO) as the exclusive collective-bargaining representative of all the Respondent's production and maintenance employees employed at its Syracuse, New York facility, excluding all professional employees, office and plant clerical employees, inspectors, watchmen, guards, and supervisors as defined in the Act.

(c) Discouraging membership in or activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 3 (AFL–CIO) or any other labor organization by locking out employees in support of an illegal bargaining position or otherwise discriminating against them in their hire or tenure.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 3 (AFL–CIO) as the exclusive collective-bargaining representative of all production and maintenance employees employed by the Respondent at its Syracuse, New York facility, excluding all professional employees, office and plant clerical employees, inspectors, watchmen, guards, and supervisors as defined in the Act.

(b) Offer to all employees whom it locked out in June, 1989, full and immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or to other rights previously enjoyed discharging, if necessary, those who have been hired to take their places,[14] and make whole all locked out employees for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the manner described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's Syracuse, New York plants copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[12] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] The Respondent has insisted throughout these proceedings that all employees hired during the lockout were temporary.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bargain to impasse over nonmandatory subjects of bargaining.

WE WILL NOT otherwise refuse to bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 3 (AFL–CIO) as the exclusive collective-bargaining representative of all our production and maintenance employees employed at our Syracuse, New York plants, excluding all professional employees, office and plant clerical employees, inspectors, watchmen, guards, and supervisors as defined in the Act.

WE WILL NOT discourage membership in or activities on behalf of the above-stated Union or any other labor organization by locking out our employees in support of illegal bargaining positions or otherwise discriminate against them in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the above-stated Union as the collective-bargaining representative of our production and maintenance employees employed at our Syracuse, New York plants, excluding all professional employees, office and plant clerical employees, inspectors, watchmen, guards, and supervisors as defined in the Act.

WE WILL offer to all employees whom we locked out in June 1989 full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, discharging, if necessary, those who have been hired to take their places and WE WILL make whole all locked out employees for any loss of pay or benefits suffered by them on and after August 24, 1990, by reason of the discriminations found herein, with interest.

R. E. DIETZ COMPANY